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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. ~~1253~~ 181

GEORGE SLATER,

Petitioner,

against

MARK E. STOFFEL, Administrator of the Estate of BERNARD J. STOFFEL, deceased, and THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of DONALD H. STOFFEL, deceased,

Respondents.

ROBERT SLATER, by GEORGE SLATER, his Father, as Next Friend,

Petitioner,

against

MARK E. STOFFEL, Administrator of the Estate of BERNARD J. STOFFEL, deceased, and THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of DONALD H. STOFFEL, deceased,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, wherein said Court held that the District Court

for the Northern District of Indiana erred in sustaining the motions of the Plaintiffs to strike the affirmative defenses raised by the defendants, based upon Plaintiffs' failure to comply with §§ 7-801 and 7-802 Burns' Indiana Stats. (1953 Repl. Ed.).

Petitioners herewith submit to the Court a joint petition for the reasons that the fact situations and legal questions are identical, the decision of the Court of Appeals for the Seventh Circuit pertains to both cases, this Court's decision as to one of the cases will be controlling as to both cases, and lastly, a joint petition will conserve the Court's time, and reduce the expense of this appeal.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, is unreported. The opinion of the United States Court of Appeals for the Seventh Circuit, a copy of which is printed in Appendix A, is reported at 313 F. 2nd 175 (1963).

The order of the District Court on the petitioners motion to strike appears at pages 30 to 38 of the appendix involving the George Slater case filed in accordance with Rule 21 (3).

JURISDICTION OF THIS COURT

(i) The Court of Appeals' opinion was entered on February 8, 1963.

(ii) On March 6, 1963, the Court of Appeals denied petitioner's request for a rehearing which was filed within the time allowed by the Rules of the Court of Appeals.

(iii) The statutory provisions conferring jurisdiction on this Court to review the judgment and decision in question, is 28 U. S. C. A. 1254(1).

THE QUESTIONS PRESENTED FOR REVIEW.

The Court of Appeals for the Seventh Circuit has departed from the usual and accepted course of judicial proceedings for the following reasons:

(a) The Court reverses the orders of two Indiana Judges. The opinion not only reverses the orders of two Indiana Judges, experienced in Indiana practice and procedure, Chief Judge Grant and Judge Eschbach of the Northern District of Indiana, but it also ignores the decisions of record of at least three other experienced Indiana Judges, Circuit Judges Swain and Treanor in *United States* v. *Peoples Trust & Savings Co., et. al.*, 97 F. 2d 771 (C. C. A. 7th, 1938) and District Judge Swygart (now Circuit Judge) in *Hellrung* v. *Lafayette Loan and Trust Co.*, 102 F. Supp. 822 (N. D. Ind., 1951) upon which counsel for petitioners relied.

All of said Judges have held that the petitioners did not have to comply with Indiana Statutes which require the filing of claims in estates and expressly prohibit the filing of suits. The Court of Appeals for the Seventh Circuit has now held that claims must be filed, and since the time for filing has expired the petitioners have been denied their causes of action.

(b) The Court of Appeals for the Seventh Circuit by its decision has denied to petitioners and for that matter to all nonresidents of Indiana, their right to have their cases heard in a federal court, which right is derived from title 28 U. S. C. A., Sec. 1332, the diversity statute.

(c) The Court of Appeals has, in effect, said, the State of Indiana may, by legislation, prohibit the petitioners from bringing their actions in a federal court, thus denying the concurrent jurisdiction which the federal courts have to hear actions involving claims against decedents estates.

(d) The Court of Appeals has forced the petitioners to seek mysterious procedures in order to reach federal court which are neither outlined in legislation or in judicial decisions.

(e) The Court of Appeals overruled one of its own decisions directly in point namely, *United States* v. *Peoples Trust & Savings Co. of Fort Wayne, Indiana*, 97 F. 2d 771 (C. C. A. 7th, 1938), 772, 773.

(f) The Court of Appeals relied heavily on the dictum in a case upon which the petitioners could not have relied, namely, *Woods* v. *Klobuchar*, 257 F. 2d 313.

(g) The Court of Appeals by its decision has extended the doctrine expressed by this Court in the cases of *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108-109 (1945) and *Erie Railroad* v. *Thompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 2d Ed. 1188 (1938), beyond recogn ion.

STATUTES INVOLVED

The case involves the following statutes:

(a) Ch. 309, § 1, p. 786, Acts 1959, Indiana Legislature, commonly referred to as the Survival Statute. It is set forth in Appendix B.

(b) Ch. 112, Acts 1953, p. 295, Indiana Legislature. It is set forth in Appendix B.

(c) Ch. 112, Acts 1953, p. 295 Indiana Legislature, commonly referred to as the Claims Statute. It is set forth in Appendix B.

(d) Title 28 U. S. C. A., § 1332 commonly referred to as the Diversity Statute. It is set forth in Appendix B.

(e) Title 28 U. S. C. A. § 1441 commonly referred to as the Transfer Statute. It is set forth in Appendix B.

(f) Ch. 112, Acts 1953, p. 295, Indiana Legislature. It is set forth in Appendix B.

(g) Ch. 112, Acts 1953, p. 295, Indiana Legislature. It is set forth in Appendix B.

STATEMENT OF THE CASE.

These are diversity actions by petitioners, George Slater, and Robert Slater, by George Slater, his father, as next friend, both residents of the State of Georgia, against defendants, Mark E. Stoffel, Administrator of the Estate of Bernard J. Stoffel, deceased, and The Community State Bank, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, all residents of the State of Indiana, seeking recovery of damages occasioned by the alleged negligence of the respondents in the operation of their automobile.

Petitioners contend that said collision, and the alleged personal injuries and other damages sustained by them was caused by the negligence of the respondents.

On July 14, 1959, respondent, Mark E. Stoffel, was appointed Administrator of the Estate of Bernard J. Stoffel, deceased (App. pp. 4, 7, 15, 21)* by the Huntington Circuit Court of Huntington County, Indiana, and the first publication of notice to creditors of said Estate was made on July 16, 1959. (App. pp. 15, 21). On December 1, 1959, the respondent, The Community State Bank, Huntington, Indiana, was appointed Administrator of the Estate of Donald H. Stoffel, deceased (App. pp. 4, 15, 21), by the Huntington Circuit Court and the first publication of notice to creditors of said Estate was made on December 2, 1959. (App. pp. 20, 27, 47.)

On December 2, 1959, within the six months statutory period of limitations as set forth in § 7-801 (a), Burns' Ind. Stats. (1953 Repl. Ed.), the petitioners filed their actions in the United States District Court in the form of complaints and issued summons for the recovery of sub-

* All (App. p. references are to pages in defendant's appendix in George Slater case, number 13812.

stantial damages, per the jurisdictional requirements contained in Title 28, U.S.C.A., Sec. 1332.

On December 28, 1959, the respondents by stipulation, were given until January 27, 1960, to answer or plead to the petitioner's complaints. (Item 8 of Record, p. 15.) On January 27, 1960, the respondents were given, by stipulation to March 28, 1960, to answer or plead. (Item 10 of Record, p. 17.) On April 13, 1960, more than four months after the filing of said complaints, the respondents filed their first pleadings, namely Motions to Dismiss alleging that the Court lacked jurisdiction for the reason that the actions could only be brought as claims against the estates in the manner prescribed by §7-802, Burns' Ind. Stats. (1959 Cum. Supp.). These motions were overruled by the Court on June 23, 1961. (App. p. 12.) On June 30, 1961, the respondents filed Motions to Amend the Orders Overruling the Motions to Dismiss, so that interlocutory appeals could be taken (App. p. 13), which motions were denied by the Court on November 7, 1961. (App. p. 14.) On February 6, 1962, the respondents filed amended answers in five paragraphs, of which the last four paragraphs claimed the Court lacked jurisdiction by virtue of the provisions of § 2-403, Burns' Ind. Stats. (1961 Cum. Supp.), and §§ 7-801, 7-802, Burns' Ind. Stats. (1953 Repl. Ed.) (App. pp. 14-28.) On February 21, 1962, the petitioners filed a Motion to Strike the last four paragraphs of the respondents' amended answers for the reason that said defenses were previously overruled by the Court at the time the respondents filed their motions to dismiss, and for the further reason that said defenses were redundant and insufficient in law. (App. p. 29.) On June 29, 1962, the Court entered its order sustaining the petitioner's Motion to Strike paragraphs 2, 3, 4, and 5 of the respondents' amended answers and at the same time granted the respondents permission to petition for an interlocutory appeal from that order. (App. pp. 30-37.)

JURISDICTION OF THE COURT OF FIRST INSTANCE.

The jurisdiction of the court of first instance lies under 28 U. S. C. A. § 1332. These suits were commenced on December 2, 1959, by the petitioners, residents of the State of Georgia, against the respondents, residents of the State of Indiana. The amount in controversy in both cases exceeds $10,000.00 dollars.

ARGUMENT.

The opinion of the Court of Appeals not only reverses the orders of two Indiana Judges, experienced in Indiana practice and procedure, Chief Judge Grant and Judge Eschbach of the Northern District of Indiana, but it also ignores the decisions of record of at least three other experienced Indiana Judges, Circuit Judges Swain and Treanor in *United States* v. *Peoples Trust & Savings Co. et al.*, 97 F. 2d 771 (C. C. A. 7th, 1938) and District Judge Swygart (now Circuit Judge) in *Hellrung* v. *Lafayette Loan and Trust Co.*, 102 F. Supp. 822 (N. D. Ind., 1951) upon which counsel for petitioners relied in proceeding in the manner they did.

In a case in which such a ruling may well have the effect of denying to petitioners a hearing on the merits of their case, their counsel respectfully submit that such a ruling should not be lightly made by a panel of the Court of Appeals without giving due consideration to the opinions of Judges experienced in Indiana practice and procedure. Those of us who have practiced in the Indiana state and federal courts for years are familiar with and used to the provisions of the Probate Code of Indiana which deny to courts of general jurisdiction the right to sue the personal representative of an estate and limit the remedy to the filing of claims in the Probate Court, which is given exclusive jurisdiction of the subject matter.

Our Indiana Code does not set up a condition precedent to the filing of suit—it denies prospective litigants any right of recourse to the courts other than the processing of a claim in the Probate Court. This Court so held in *United States* v. *Peoples Trust & Savings Co. et al.*, 97 F. 2d 771

at 772 (C. C. A. 7th, 1938) wherein it approves and follows the statement of the Supreme Court in *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 30 S. Ct. 10, 54 L. Ed. 80:

> "The rule stated in many cases in this court affirms the jurisdiction of the federal courts to give relief of the nature stated. Notwithstanding the statutes of the State undertake to give to state probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates."

This is not a matter of election of remedy so the Tennessee case cited in the Court of Appeals opinion and the reference to 21 Am. Jur., 601, Sec. 387 do not bear on the matter. Further, the Tennessee claim statute is not comparable with the Indiana statutes, since it does not prohibit suits. The Indiana Probate Code does not create the cause of action. It arises under the Survival Statute (Burns' Ind. Stat. § 1-403). The Indiana Probate Code specifically deprives all courts of jurisdiction of claims against personal representatives except the Probate Court. This it may not do under Title 28 U. S. C. A. Sec. 1332, the diversity statute.

Woods v. *Klobuchar*, 257 F. 2d 313 (C. C. A. 7th, 1958) merely holds that the time limitations for filing claims in the Probate Court limit the time for filing suit in the federal courts. This is obviously correct as the choice of forum could not extend the time for suing.

While the opinion of the Court of Appeals by way of dictum, states that the filing of the claim in the state court does not prevent trial in the federal court, we wish to point out that no authority is cited to support the dictum and the case *holds* that suit may not be filed in the federal court after the six month period for filing claims has expired. Since claims need not be disallowed until after the six month period has expired (Burns 7-810), a plaintiff could

not go through the Indiana State Court procedure without losing his constitutional rights to have his case heard in the federal court.

The claim does not reach the trial docket in the state court until the time to sue in the federal court has expired. *Woods* v. *Klobuchar*, *supra*. We know of no way for a plaintiff or claimant in a state court to remove his proceedings to the federal court for trial after it reaches that point in the state courts.

The United States Code contains no provisions which permit a plaintiff to remove to a United States District Court an action he has commenced in the state court. In fact title 28 U. S. C. A. § 1441 (a) specifically limits right to the defendants.

If claims had been filed in the State Probate Court and then an action filed in the Federal Court, the respondents would have contended that by virtue of § 7-102 Burns' Ind. Stats. (1953 Repl. Ed.) which provides as follows:

> "7-102 Character of Proceedings.—The probate of a will and the administration of the estate shall be considered one proceeding for the purposes of jurisdiction, and said entire proceedings and the administration of a decedent's estate is a proceeding in rem."

that after the petitioners filed their claims in the Probate Court, that Court, because of the above statute, assumed control over this claim and the Federal Court could not take jurisdiction. The Court of Appeals for the Seventh Circuit held in *Conrad* v. *Gurtley*, 238 F. 2d 464 that once a claim was filed in a state court, the state acquired control over the rest and thereby obtained prior and hence exclusive jurisdiction. § 7-102 Burns' Ind. Stats. does not speak in terms of part of the estate proceedings being in rem and part in personam, but rather, that the entire proceedings are an in rem action.

Within the intent of the *Guaranty Trust Co. v. York*, 326 U. S. 99 case, the filing of a claim and affidavit produces no substantial effect on the outcome of this type of litigation, since the result will be the same, but again, the statutes in question do not establish conditions precedent, but rather, seek to give the state court exclusive jurisdiction.

The Court of Appeals apparently relied heavily on the cases of *Otolski v. Nowiki*, 129 Ind. App. 492, 158 N. E. 2d 296; *Bahr v. Zahm et. al.*, 219 Ind. 297, 37 N. E. 2d 942; *Louis v. Estate of Smith et. al.*, 130 Ind. App. 398, 162 N. E. 2d 457; and *Russell v. Moore et. al.*, 130 Ind. App. 351, 164 N. E. 2d 670, as holding that § 7-801 (a) Burns' Ind. Stats. (1953 Repl. Ed.) is not a statute of limitation but a statute limiting the right of action and creating conditions precedent. First of all, none of these cases are analogous since in all of these cases a claim was not filed or a suit commenced within the six months period of time. Second, none of these cases involved the question of whether or not a claim had to be filed in the State Court before an action could be commenced in a federal court. Third, the Court, in each case, does not say that if the petitioners had filed a claim in State Court that they had the right to commence in any other court an action, by suit and summons. Fourth, in the *Otolski* case, the decision, as it relates to the question of the claim, is completely dictum and the court admits as much since the court initially decided it did not have jurisdiction. Fifth, none of these cases hold that if the petitioners filed a claim and affidavit in state court that then they could sue in federal court. Sixth, these cases do not hold that §§ 7-801 and 7-802 were intended to be conditions precedent and not prohibitions against the filing of actions. Seventh, the petitioners have always admitted that they

were bound to file their actions within the six months period. In summary, the petitioners contend that all of these cases merely hold, that if a claim was going to be filed in the state courts of Indiana, it could not be filed after six months.

There is one further point not previously emphasized by the petitioners and that is, the respondents waived their affirmative defenses when they asked for and obtained an extension of time to file their first pleadings, and thus, took the petitioners beyond the six month period for filing claims. Granted, a claim could have been filed in the Donald H. Stoffel Estate, but that estate was opened by the petitioners and only as a defensive measure, since all of the petitioners' evidence is that Bernard J. Stoffel was operating the vehicle which collided with the petitioners' vehicle.

CONCLUSION

In conclusion; the petitioners have only one point to make and that is, five Judges who formerly practiced in the State of Indiana and later advanced to the bench, have held, on six different occasions, that the petitioners could proceed as they did in this case. Both Judge Sparks and Treanor who sat on the bench along with Judge Major in the case of *United States* v. *Peoples Trust* were Judges appointed from the State of Indiana. Judge Swygart is a Judge from the State of Indiana as well as Judge Robert A. Grant who, on two previous occasions in this case, held for the petitioners, and of course, Judge Eschbach. It is certainly a shock to the petitioners to learn, at this time, that all five Judges were wrong and that because they relied upon the decisions of three of them as affirmed by Judge Grant and Judge Eschbach, that they must now pay the penalty of losing their constitutional right to a hearing of their cases on the merits in a federal court.

For the foregong reasons, petitioners respectfully urge that a writ of certiorari be issued to the Court of Appeals for the Seventh Circuit and that upon review, the decision of the Court of Appeals be reversed.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

No. 13812-3 September Term 1962—January Session 1963

GEORGE SLATER, *Plaintiff-Appellee*, No. 13812 v. MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, *Defendants-Appellants*.	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
ROBERT SLATER, by George Slater, his Father, as Next Friend, *Plaintiff-Appellee*, No. 13813 v. MARK E. STOFFEL, Administrator of the Estate of Bernard J. Stoffel, deceased, and THE COMMUNITY STATE BANK, Huntington, Indiana, Administrator of the Estate of Donald H. Stoffel, deceased, *Defendants-Appellants*.	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

February 8, 1963

Before DUFFY, CASTLE and KILEY, *Circuit Judges*.

DUFFY, *Circuit Judge*. On June 6, 1959, an automobile collision occurred on a public highway in Huntington County, Indiana. One of the motor vehicles involved was

driven by George Slater, a resident of the State of Georgia. His son, Robert Slater, was, at said time and place, a passenger in the Slater automobile.

The other motor vehicle involved in the collision was operated by either Bernard J. Stoffel or Donald H. Stoffel, both of whom were killed in the collision. The Stoffels were residents of Huntington County, Indiana.

Mark E. Stoffel was appointed administrator of the Bernard J. Stoffel estate by the Huntington Circuit Court. The first publication of notice to creditors was made on July 16, 1959. The Community State Bank, Huntington, Indiana, was appointed administrator of the estate of Donald H. Stoffel. The first publication of notice to creditors in this estate was made on December 2, 1959.

On December 2, 1959, George Slater, as plaintiff in suit No. 13812, and Robert Slater, by George Slater, his father and next friend, as plaintiff in suit No. 13813, filed actions for damages in the United States District Court for the Northern District of Indiana. The defendants named in each suit were the administrators of the two Stoffel estates. Each suit was based on diversity of citizenship with requisite amount in controversy.

The principal issue on each appeal before us is whether plaintiffs may maintain these actions in a United States District Court without first complying with the requirements of § 7-801 and § 7-802, Burns' Indiana Stat. (1953 Repl. Ed.).

Section 7-801(a) contains the statute of limitations on filing claims against a decedent's estate. In pertinent part it provides: "All claims against a decedent's estate [. . . shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court . . . within six (6) months after the date of the first published notice to creditors."

Section 7-802 provides, in part: "No action shall be brought by complaint and summons against the personal representative of an estate for the recovery . . . against the decedent, or his estate, but the holder thereof . . . shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending . . . the statement . . . shall be accompanied by the affidavit of the claimant, his agent or attorney . . . and no claim shall be received unless accompanied by such affidavit. . . ."

The Indiana Survival Statute, § 2-403, Burns' Indiana Stat. (1962 Cum. Supp.) provides: "All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party . . . in event the action be brought subsequent to the death of the party against whom the cause existed, then the same shall be prosecuted as other claims against said decedent's estate."

It is admitted that neither plaintiff filed a claim together with the required statutory affidavit against the estate of either of the decedents pursuant to §§ 7-801 and 7-802, Burns' Indiana Stat. (1953 Repl. Ed.). However, it is established that each plaintiff did file his complaint in the United States District Court within the six months period provided by § 7-801(a).

Defendants, by amended answers, allege the United States District Court had no jurisdiction of the subject matter of the action because jurisdiction thereof was vested exclusively in the Huntington Circuit Court; that plaintiffs' claims were barred by the statute of limitations because plaintiffs failed to file their claims as required by § 7-801(a), Burns' Indiana Stat. (1953 Repl. Ed.); that §§ 7-801 and 7-802 are not merely acts of limitation but constitute the denial of a right of action and impose conditions precedent.

Plaintiffs moved to strike the affirmative defenses. The Court sustained the motions to strike and an order striking the defenses was entered. The Court found the order involved a controlling question of law as to which there is substantial ground for a difference of opinion, and that an immediate appeal from the interlocutory order might materially advance the termination of the litigation. This Court granted leave to appeal. 28 U. S. C. § 1292(b).

Inasmuch as Bernard Stoffel and Donald Stoffel died

at the time of the collision or shortly thereafter, it is clear that plaintiffs could not have brought a suit for damages against them or their estates or personal representatives except for a right created by the State of Indiana. This is the right under the so-called "Survival Statute", § 2-403, Burns' Indiana Stat. (1962 Cum. Supp.). An important provision of this statute to be kept in mind is: ". . . [I]n event the action be brought subsequent to the death of the party against whom the cause existed, then the same shall be prosecuted as other claims against said decedent's estate."

Here, a federal court, by reason of diversity of citizenship, is asked to adjudicate a state-created right. The plaintiffs' exercise of that right is subject to the terms and conditions specified by the Indiana statute.

In *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 108-109, the Supreme Court said: ". . . But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."

In *Angel* v. *Bullington*, 330 U. S. 183, 191-2, the Court stated: ". . . The essence of diversity jurisdiction is that a federal court enforces State law and State policy . . . What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens."

This Court, in *Allstate Insurance Company* v. *Charneski*, 286 F. 2d 238, in an opinion by Chief Judge Hastings, after discussing and analyzing several of the most pertinent Supreme Court decisions, said, at page 243: "In summary, federal courts in diversity cases have applied the *Erie* doctrine to state conflict of law rules, state statutes of limitations, state burden of proof rules, state precedent as to contributory negligence, state court-closing statutes, and even as in *Ragan* v. *Merchants Transfer & Warehouse Co.*, *supra* (337 U. S. 530) to giving precedence to state procedural statutes dealing with service of process over the Federal Rules of Civil Procedure."

Plaintiffs argue that the statutory provisions, §§ 7-801 and 7-802 are not conditions precedent except for the six months statute of limitations. However, Indiana courts have stated the provisions of these statutes are conditions precedent. In *Otolski* v. *Nowicki*, 129 Ind. App. 492, 158 N. E. 2d 296, the Court stated (N. E. 2d 298): ". . . A statute of this type has been referred to as not being a statute limiting the remedy or, in other words, a statute of limitation, but as a statute constituting a denial of a right of action and imposing a condition precedent to the enforcement of such right of action."

To the same effect are *Bahr* v. *Zahm et al.*, 219 Ind. 297, 37 N. E. 2d 942, 944; *Lewis* v. *Estate of Smith et al.*, 130 Ind. App. 390, 162 N. E. 2d 457, 458; and *Russell* v. *Moore et al.*, 130 Ind. App. 351, 164 N. E. 2d 670, 673.

It is conceded that citizens of Indiana, in order to recover from an administrator of a decedent on a tort claim, would be required not only to file a claim within six months, but also to comply with the other provisions of §§ 7-801 and 7-802.

The trial judge recognized that plaintiffs were required to comply with the laws of Indiana, but he engrafted an

exception as follows: "... : [E]xcept that plaintiffs cannot be barred or precluded from their selection of the federal court as their forum where concurrent jurisdiction exists with the state court."

The basis of the trial court's decision appears in this sentence: "Therefore, it is the opinion of this Court that plaintiffs complied with the Indiana law to the extent that they could do so without materially interfering or jeopardizing their right to select this court as their forum."

Plaintiffs strongly urge that if they had filed claims and affidavits with the clerk of the State court as provided in §§ 7-801 and 7-802, they would have locked themselves in the State court and would have thus been precluded from later filing suit in the federal court. Reference is made to § 7-810, Burns' Indiana Stat. (1953 Repl. Ed.) which provides that when the personal representative disallowed the claim, it is automatically transferred to the trial docket of the State court.

Defendants claim that plaintiffs, by filing suit in the federal court without complying with § 7-802, have deprived them of the opportunity granted by the Indiana Statute of investigating the merits of plaintiffs' claims and of making a decision with respect to the payment thereof without the delay and expense of litigation. Also, that defendants never have been presented with an affidavit in any form, and that even the complaints were not verified. Of course, plaintiffs were permitted to file unverified complaints under the federal practice.

We think it was for the State of Indiana to specify as to what must be presented to constitute a valid claim. Plaintiffs' position is unique in suggesting that the notice requirement was to be complied with in some way but that the affidavit requirement could be ignored.

Plaintiffs seem to argue that if they complied with the

Indiana statutes hereinbefore quoted, they would necessarily be held to have elected their remedy and forum in the state court. We do not think this position is well taken.

Courts, in many states, have held that filing a claim against an estate will not be regarded as an election of remedies. To illustrate: In *Coffey* v. *Durand et al.*, 167 S. W. 2d 684 (Tenn.) the Court said at page 688: "It is generally held that the filing of a claim against the estate of a decedent will not be regarded as an election of remedies, precluding the claimant from pursuing other remedies not inconsistent with the filing of such claim. The mere presentation of a claim against an estate, without prosecuting it to final determination, will not be taken as an election to pursue that remedy and no other. See 21 Am. Jur., 601, Sec. 387 and notes."

Defendants' counsel suggests a course which plaintiffs could have followed, to-wit: "Plaintiffs could have filed their notices of claim, together with the required statutory affidavits, with the Clerk of The Huntington Circuit Court within the time allowed by §7-801(a), Burns' Ind. Stats. (1953 Repl. Ed.), noting therein that diversity of citizenship existed between plaintiffs and the personal representatives and stating plaintiffs' intention to prosecute actions in the Federal Court in the event the claims were rejected. . . .".

We do not pass upon the suggestion thus made, but will quote from the decision of this Court in *Woods* v. *Klobucher*, 257 F. 2d 313, where we considered the same Indiana statutes which have been heretofore referred to in this opinion. In the *Woods* case, we said, page 315: "Plaintiff concedes that if he were a citizen of Indiana he would have had to comply with §§ 7-801(a) and 7-802 and having failed to do so, would have lost his right of action. In other words, he admits that on December 31, 1954 his action was forever

barred in the state courts of Indiana. He, however, contends that he cannot be deprived of his right to have his case tried in a federal court. With this we agree, however, compliance with §§ 7-801(a) and 7-802 in accordance with the mandate of § 2-403 does not preclude a qualified non-resident claimant from having his claim litigated in the federal court upon transfer to the civil trial docket pursuant to § 7-810. It is not for us to here chart in detail such a course."

We hold the District Court erred in sustaining the motions of the plaintiffs to strike the affirmative defenses, based upon plaintiffs' failure to comply with §§ 7-801 and 7-802, Burns' Indiana Stat. (1953 Repl. Ed.).

The order granting the motion to strike is

REVERSED.

APPENDIX B.

(a) 2-402 : All Actions Survive—Exception—Continuance of Actions—Damages.—All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party, except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein. Any action contemplated in this section or in section 6 (§ 2-402) of this act may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Every such action shall be deemed to be a continued action, and therefore accrued to such representatives or successors at the time it would have accrued to the deceased if he had survived. If any such action is continued against the legal representatives or successors of the defendant, a notice shall be served on him as in the case of an original notice. If any action has been commenced against the decedent prior to his death, the same shall continue by substituting his personal representatives as in other actions surviving the defendant's death; in event the action be brought subsequent to the death of the party against whom the cause existed, then the same shall be prosecuted as other claims against said decedent's estate. Provided, however, that when a person receives personal injuries caused by the wrongful act or omission of another and thereafter dies from causes other than said personal injuries so received, the personal representative of the person so injured may maintain an action against the wrongdoer to recover damages resulting from such injuries, if the person so injured

might have maintained such action, had he or she lived; but provided further, that the personal representative of said injured person shall be permitted to recover only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death. (Acts 1881 (Spec. Sess.), ch. 38, § 7, p. 240; 1937, ch. 292, § 2, p. 1341; 1955, ch. 257, § 1, p. 666; 1959, ch. 309, § 1, p. 786.)", Burns' Indiana Statutes (1962 Cum. Supp.)

(b) 7-801(a). "Limitations on Filing Claims—Statutes of Limitation—Claims Barred When No Administration Commenced—Liens Not Affected.—(a). All claims against a decedent's estate, other than expense of administration and claims of the United States, and of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court in which such estate is being administered within six (6) months after the date of the first published notice to creditors. (Acts 1953, ch. 112, § 1401, p. 295.)" Burns' Ind. Stats. (1953 Repl. Ed.)

(c). 7-802 "Filing of Claims Against Estates—Suits Forbidden.—No action shall be brought by complaint and summons against the personal representative of an estate for the recovery of any claim against the decedent, or his estate, but the holder thereof, whether such claim be due or not, shall file a succinct and definite statement thereof in the office of the clerk of the court in which the estate is pending; any claims of the personal representative against the decedent, shall be made out and filed in the office of the clerk of the court in which the estate is pending; if any claim against the decedent be founded upon any written

instrument, alleged to have been executed by him, the original, or a complete copy thereof, shall be filed with the statement, unless it is lost or destroyed, in which case its loss or destruction must be stated in the claim; the statement shall set forth all credits and deductions to which the estate is entitled and shall be accompanied by the affidavit of the claimant, his agent or attorney, that the claim, after deducting all credits, set-offs and deductions to which the estate is entitled, is justly due and wholly unpaid, or if not yet due, when it will or may become due, and no claim shall be received unless accompanied by such affidavit; if the claim be secured by a lien on any real or personal property, such lien shall be particularly set forth in such statement, and a reference given to where the lien, if of record, will be found. If the claim is contingent, the nature of the contingency shall also be stated. No statement of claim need be filed as provided in this section as to those claims which are paid by the personal representative within six (6) months after the date of the first published notice to creditors. (Acts 1953, ch. 112, § 1402, p. 295.)" Burns' Indiana Statutes (1953 Repl. Ed.)

(d) 1332(a) & (b) "Diversity of Citizenship; Amount in Controversy; Costs— (a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between (1) citizens of different States; (2) citizens of a State, and foreign states or citizens or subjects thereof; and (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b). Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the

sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. As amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, § 2, 72 Stat. 415." Title 28 U. S. C. A. § 1332(a) & (b).

(e) § 1441 "Actions Removable Generally. Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. June 25, 1948, c. 646, 62 Stat. 937." Title 28 U. S. C. A. § 1441 (a).

(f) § 7-102 "Character of Proceedings.—The probate of a will and the administration of the estate shall be considered one proceeding for the purposes of jurisdiction, and said entire proceeding and the administration of a decedent's estate is a proceeding in rem. (Acts 1953, ch. 112, § 702, p. 295.)" Burns Ind. Stats. (1953 Repl. Ed.)

(g) § 7-810. "Claims, Allowance, Transfer, Trial.—(a) On or before six (6) months and fifteen (15) days after the date of the first published notice to creditors, the personal representative shall allow or disallow each claim filed within six (6) months after the date of the first published notice to creditors by making appropriate notations on the margin of the claim and allowance docket showing the action taken as to each claim. If a personal representative determines that he should not allow any claim in full such claim shall be noted 'disallowed.' All claims which are disallowed, or which are neither allowed or dis-

allowed within said period of six (6) months and fifteen (15) days, shall be transferred at once to the issue docket for trial and if the court, upon hearing, allows, in full, a claim which was neither allowed or disallowed by the personal representative the costs of such action shall be taxed against the personal representative as an individual. In the event of a compromise or other adjustment of a claim which is duly filed, the personal representative shall make an appropriate notation thereof on the margin of the claim and allowance docket. If the personal representative, after allowing a claim and before paying it, determines that such claim should not have been allowed, he may change the notation on the claim and allowance docket from 'allowed' to 'disallowed' and he shall notify the creditor of such in writing. (Acts 1953, ch. 112, § 1410, p. 295.)" Burns Ind. Stats. (1953 Repl. Ed.) (a).

APPENDIX C.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago 10, Illinois.
Wednesday, March 6, 1963.

Before
Hon. F. Ryan Duffy, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

ROBERT SLATER, by George Slater, etc.,
GEORGE SLATER,
Plaintiffs-Appellees,
No. 13812-13 vs.
MARK E. STOFFEL, Adm., etc., et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

IT IS ORDERED by the Court that the petition for rehearing filed jointly by plaintiffs-appellees in the above cause be, and the same is hereby DENIED.